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No. 110

In the Supreme Court of the United States

OCTOBER TERM, 1961

CLEO E. LOVETT, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING

ZACH H. DOUGLAS
505 Lynch Building
Jacksonville 2, Florida

Attorney for Petitioner

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The appellant above named respectfully petitions this Honorable Court for a rehearing of its petition for writ of certiorari in the above-entitled cause, and in support of this petition represents to the Court as follows:

Reserving our argued position as to each of the points of our petition for certiorari, we petition for rehearing solely upon the grounds of plain error committed below, and not heretofore raised for consideration before this tribunal.

It is the contention of the petitioner that such error below should be noticed by this Court by reason of the following grounds:

(1) The indictment under which the petitioner was convicted of the felony of Conspiracy to Commit Offense or to Defraud the United States, 18 U.S.C.A. 371, and subsequently sentenced to three years' imprisonment, alleged the object of the conspiracy to be the violation of five distinct provisions of the Internal Revenue Code, Title 26. Of the five offenses, one, Section 5008(b), Title 26, I.R.C., is a misdemeanor; the others, Sections 5601, 5606, 5632, and 7206(4), Title 26, I.R.C., are felonies. In view of the present law of conspiracy that the jury need not find the accused guilty of violation of more than one of the offenses for a verdict of guilty, the prejudicial effect of this indictment becomes immediately apparent. Appellant stands in the position of one who is sentenced to a felony even though a substantial possibility exists that in the eyes of the jury he is guilty of a misdemeanor only. He is a man whom the jury may very well have found guilty of a misdemeanor upon the evidence of a felony or felonies; yet, once convicted upon such findings, he is subject to the graver penalty meted properly to a felon.

(2) The Fifth Circuit Court of Appeals discussed the problems arising under 18 U.S.C.A. 371 in the case of *Williams v. United States*, 238 F. 2d 215 (5th Cir. 1956), but failed to render a holding upon the merits of the question, here again presented, due to defendant's failure to preserve the question

on appeal by proper objection below. The petitioner in the instant case admits his similar failure to make proper objection; but submits that to allow the use of an indictment of this nature to go uncorrected, possibly determining thereby whether the accused shall be sentenced to a maximum possible penalty of 30 days imprisonment and a $1000 fine for conviction of a misdemeanor or to the three-year term of imprisonment actually received by the petitioner for the felony of conspiracy, is to commit error constituting a defect affecting substantial rights of petitioner and falling thus within the "plain error" provision of Federal Rule of Criminal Procedure 52(b).

For the foregoing reasons, this petition for rehearing should be granted.

Respectfully submitted by

ZACH H. DOUGLAS
505 Lynch Building
Jacksonville 2, Florida

Attorney for Petitioner

Certificate of Service

I hereby certify that I have served a copy of the foregoing Petition for Rehearing, by mail, to the United States Attorney, Federal Building, Montgomery, Alabama, and a copy to the Solicitor General of the United States, Department of Justice, Washington, D. C. on this 1st day of November, 1961.

Zach H. Douglas